BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions below have been referred to in the petition for writ of certiorari under this same caption.

JURISDICTION

The statement as to jurisdiction has been set forth in the petition.

STATEMENT OF THE CASE

The facts have been stated in the Summary Statement contained in the petition.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in holding that the defendants could be lawfully convicted and sentenced on each of forty-eight counts of an indictment which showed on its face that the sales or transactions charged in several of the counts were mere fragments of identical acts charged in other counts of the same indictment.

2. The Circuit Court of Appeals erred in holding that Dowling Bros. Distilling Company was liable for the criminal acts of Robert Gould in the absence of any proof that the corporation received benefit from such acts, and in the absence of proof that any other member or representative of the corporation possessed knowledge of Gould's alleged transactions.[2]

3. The Circuit Court of Appeals erred in affirming the District Court's admission of testimony as to other unlaw-

[2] In this respect, the error of the Circuit Court of Appeals was twofold. The District Court overruled Dowling Bros. Distilling Company's demurrer to the indictment. The District Court also instructed the jury in effect that Dowling Bros. Distilling Company should be held criminally liable for the unlawful acts of Gould, a major stockholder and director, and the manager of its sales. This instruction was given over the objection of petitioners' counsel. Both errors were specified in the appeal and hence both were sanctioned by the Circuit Court of Appeals.

ful acts of the petitioner, Gould, such acts not being charged in the indictment and Gould never having been indicted or convicted for them.

4. The Circuit Court of Appeals erred in affirming the judgment and sentences of the District Court for the Eastern District of Kentucky.

ARGUMENT

I. Defendants Cannot Lawfully Be Convicted on Multiple Counts of an Indictment Which Cover Identical Transactions.

The defendants were convicted and given maximum sentences on all forty-eight counts of an indictment charging violations of Section 4 (a) of the Emergency Price Control Act of 1942, as amended, (Section 904 [a], Title 50, U. S. C., War, Appendix) which provides in its pertinent parts:

> "It shall be unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order under Section 2 (Section 902 of this Appendix) or of any price schedule effective in accordance with the provisions of Section 206 (Section 926 of this Appendix), or of any regulation, order or requirement under Section 202 (b) or Section 205 (f), [Sections 922 (b) or 925 (f) of this Appendix], or to offer, solicit, attempt or agree to do any of the foregoing."

The penalty section under which the defendants were sentenced is Section 925 (b), Title 50, U. S. C., (War, Appendix) which provides in part:

> "Any person who wilfully violates any provision of Section 4 of this Act (Section 904 of this Appendix) . . . shall, upon conviction thereof, be subject to a fine of not more than $5,000 or to imprisonment for not more than one year . . . or to both such fine and imprisonment."

Petitioners contend that the indictment in the instant case reveals on its face that a substantial number of its individual counts are based upon alleged sales or deliveries which are, in fact, but fragments of identical sales and deliveries charged in other counts. Artificial separation of single transactions into minute fragments, serves to multiply unlawfully the penalties imposed by Congress for violation of the Emergency Price Control Act.

Counts 1 and 2 of the indictment (R. 2-7), taken together, charge that on June 16, 1943, Robert Gould agreed to sell one Josselson seven hundred twenty-four cases of whiskey and two hundred cases of rum. This rum and the whiskey were invoiced on June 26, 1943 (thus indicating a single delivery), and paid for by a single check (R. 207). Thus, there was clearly a single, unitary transaction, based upon one agreement, and paid for by a single check. The statute in question prohibits the unlawful sale or delivery of a commodity. The only apparent basis for separating the transaction into two counts, was the fact that both whiskey and rum were involved in the transaction.

Likewise, Counts 3, 4, 5 and 6 (R. 7-18), taken together, charge that on July 7, 1943, petitioner, Robert Gould, agreed to sell Josselson, at unlawful prices, two thousand, four hundred twenty-four cases of whiskey, one thousand, ninety-six cases of brandy, and three hundred cases of rum. Here, again, was a single transaction artificially divided into four separate counts.

Counts 7 and 9 of the indictment (R. 18-21, 23-26), taken together, charge that on August 4, 1943, Robert Gould agreed to sell Josselson four hundred fifty cases of whiskey and four hundred sixty-two cases of brandy. Thus, a sale agreed to in a single transaction, was made the basis for two separate counts.

Counts 10, 11, 12 and 13 (R. 26-37), Counts 14, 15, 16 and 17 (R. 37-48), and Counts 19, 20, and 21 (R. 51-59), each

group taken together, indicate the unjustified and artificial fragmentization of what were essentially single transactions. The evidence, though not the actual language of the indictment itself, would point a similar conclusion in respect of Counts 30 and 31 (R. 386), Counts 32 and 33 (R. 387), Counts 36 and 37 (R. 388), Counts 38 and 39 (R. 389), and Counts 40 and 41 (R. 390).

The arbitrary and invalid character of this indictment is well illustrated by *In re Snow*, 120 U. S. 274. In that case, the defendant was accused of cohabiting with more than one woman, in violation of Federal law. The indictment contained three counts, one for the year 1883, one for 1884 and one for 1885. He was convicted on each count. The conviction was held void by this Court, which stated, 120 U. S. at 282:

> "The division of two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, . . . , or even an indictment covering every week . . . ; and so on, *ad infinitum*, for smaller periods of time. . . . Here each indictment charged unlawful cohabitation with the same seven women; all the indictments were found at the same time, by the same grand jury, and on the testimony of the same witnesses, covering a continuous period of thirty-five months; and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more."

The analysis thus used in the *Snow* case is equally applicable to the case at bar. In each of the groups of counts referred to, there was but a single transaction. These transactions were separated by the arbitrary will of the grand jury, which might equally have returned a separate count for each case of liquor, for each bottle or for each drink. The touchstone by which to determine where one

transaction ends and another begins was revealed in *Blockburger* v. *United States,* 284 U. S. 299, where this Court stated, at page 302:

> "Each of several successive sales constitutes a distinctive offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' Wharton's Criminal Law, 11 Ed., § 34."

When this test is applied to the case at bar, it becomes clear that, for example, Counts 1 and 2 of this indictment relate to a transaction which was the result of a single impulse. Therefore, it cannot be made the basis of more than a single count. See *Braverman* v. *United States,* 317 U. S. 49, 52-55.

The doctrine thus enunciated claims lineage from the decision of Lord Mansfield in *Crepps* v. *Durden,* 2 Cowper 640, where it was held that the indictment of a baker for unlawfully working upon the Lord's day, could not be separated into a multitude of offenses, each relating to a separate sale on the same day.

The point is also well illustrated in *Standard Oil Company of Indiana* v. *United States,* 164 Fed. 376 (C. C. A. 7), cert. den., 212 U. S. 579. In that case, the defendant was sentenced to pay the maximum fine on each of fourteen hundred sixty-two counts in an indictment charging violation of the Elkins Act, prohibiting discriminatory concessions in respect of rates for transportation in interstate commerce. Each count charged the shipment of a single car of oil. The Court of Appeals reversed the conviction, basing its decision upon the fact that there were but thirty-six transactions within the period charged in the indict-

ment and that these had been artificially separated into fourteen hundred sixty-two counts.

Similarly, in *Robinson* v. *United States,* 143 F. (2d) 276 (C. C. A. 10), the Court of Appeals reversed the conviction under the Mann Act upon indictments charging a single act of transportation, a number of women having been transported for immoral purposes at the same time. The court held that the single act of transportation could not be separated into multiple counts for each woman transported, stating at page 277:

> "Merely because one element of a single criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count."

But cf. *Crespo* v. *United States,* 151 F. (2d) 44 (C. C. A. 1). Other cases illustrating the same principle are *Powe* v. *United States,* 11 F. (2d) 598 (C. C. A. 5); *Short* v. *United States,* 91 F. (2d) 614 (C. C. A. 4); *United States* v. *Anderson,* 101 F. (2d) 325 (C. C. A. 7); and *Bertsch* v. *Snook,* 36 F. (2d) 155 (C. C. A. 5).

In connection with this contention of petitioners, it must be noted that petitioners' objection to the indictment was not specified as error in the appeal to the Circuit Court of Appeals, was not argued before the Circuit Court of Appeals and was not considered by the Circuit Court of Appeals until it denied petitioners' supplementary petition for rehearing (R. 993-1011). However, this presents no fatal obstacle to its consideration by this Court on petition for certiorari. In *Carter* v. *United States,* 135 F. (2d) 858, a conviction was reversed on rehearing after original affirmance. The basis for the reversal was not made a ground of

appeal, nor was it assigned for error. However, the court held that the error was "of so fundamental a character as to demand our attention."

The error in the instant case is equally fundamental, and it was, therefore, error on the part of the Circuit Court of Appeals to deny the supplementary petition for rehearing. *Pierce* v. *United States*, 255 U. S. 398. Furthermore, conviction upon counts in an indictment which do not validly charge an offense, are subject to collateral attack on *habeas corpus*. *In re Snow*, 120 U. S. 274. *A fortiori*, therefore, such error on the part of the trial court may be considered on petition for certiorari, even though not originally alleged as error in the appeal to the Circuit Court of Appeals.

II. The Corporation Cannot Be Held Criminally Liable for the Unlawful Acts of Its Representative in the Absence of Knowledge by the Corporation or Benefit to It.

A. *Relation between Gould and the Corporation.*

Petitioner, Dowling Bros. Distilling Company, is a Kentucky corporation, with its principal office in Kentucky (R. 372, 651). Of its 114,200 shares of issued stock, petitioner, Robert Gould, owned 60,000 shares during the period covered by the indictment, while his brother, Alvin Gould, owned 54,180 shares (R. 372-373).

Robert Gould was a director of the corporation, but not an officer (R. 650). He was also an independent whiskey broker and was interested in other distilleries (R. 652-658). His personal offices and his residence were at Cincinnati, Ohio, and not in Kentucky (R. 567, 649). The executive offices of the corporation were in Burgin, Kentucky (R. 650, 760, 843).

Alvin Gould, the other substantial stockholder, was serving in the United States Coast Guard during the entire period covered by the indictment (R. 750-751). The record

does not indicate that he took any part in the transactions charged in the indictment or revealed in the trial.

B. *The Josselson Sales.*

The first twenty-one counts of the indictment charge unlawful sales from Gould and the corporation to Josselson (R. 2-59).

Josselson first met Robert Gould in Cincinnati in 1943, having approached him because he knew Gould was in the whiskey business (R. 202-203). There is no evidence that Josselson knew anything about the Dowling Bros. Distilling Company or that he requested Dowling whiskey. Josselson testified that he made arrangements to buy whiskey from Gould, and that the alleged unlawful payments in excess of the invoice prices, were to be paid to Gould (R. 230). As to each sale alleged in the first twenty counts, Josselson testified that he received a shipment and invoice from the corporation at lawful prices and that he paid the regular ceiling price by check to the corporation (R. 205-242). Josselson then testified that he paid the unlawful excesses in cash to Robert Gould personally in his office at Cincinnati, Ohio, with no one present, save Josselson and Gould (R. 209-242). These alleged payments were made to Gould after Josselson had received shipments and invoices from the corporation (R. 215, 270, 274).[3]

C. *The Baumer Sales.*

Counts 22 through 48 of the indictment charge illegal sales to Baumer, who first met Robert Gould in May, 1943, at Cincinnati, where he had gone to get some whiskey. From Baumer's testimony, the arrangements which he

[3] With respect to the 21st Count, Josselson testified that the excess payment was made in cash to Robert Gould, in Josselson's own office at Ashland, Kentucky (R. 305-306). At this time, Robert Gould was in Ashland visiting his brother who was stationed there in the Coast Guard, but the record shows that no one was present and saw the money transferred except Josselson and Robert Gould (R. 307, 542). There is no evidence that Alvin Gould knew of this payment, or of any alleged payment made to Robert Gould.

made with Gould were substantially the same as those to which Josselson testified (R. 375-413).

D. *The Corporation Received No Benefit from the Acts of Robert Gould and Had No Knowledge of His Unlawful Conduct.*

As previous references to the record demonstrate, no stockholder, director, officer or other representative of the corporation other than Robert Gould had any knowledge of the arrangements between Gould and Josselson or Baumer. None of the illegal payments ever reached the corporation or went further than the hands of Robert Gould, so far as the record indicates. Insofar as Gould entered into illegal arrangements for the sale of Dowling Bros.' product, he was committing a fraud on the corporation. Though Alvin Gould owned almost as much of the stock of Dowling Bros. Distilling Company as did Robert Gould, there is no evidence that he was involved in the transactions, possessed any knowledge of them or received any benefit. Thus, any illegal agreements or transactions in which Robert Gould participated, constituted an unlawful and fraudulent use of the corporation's product and facilities for personal profit to Robert Gould, and fraudulently subjected the corporation to the possibility of detriment and liability.

In affirming the sentences imposed on the corporation by the trial court, the Court of Appeals emphasizes the fact that Robert Gould and his brother, Alvin, owned substantially all the stock in the corporation. However, in the absence of any proof that Alvin Gould participated in the unlawful acts of Robert Gould, or benefited from them, it cannot be assumed that he was in *pari delicto*.

The fraud allegedly committed by Robert Gould against the corporation which he represented, served to insulate the corporation's liability and to save it from the imputa-

tion of knowledge of such conduct by its agent. As Mr. Fletcher states in his Cyclopedia of Corporations, Volume 3, Section 826:

> "One well established exception to the rule that a corporation is charged with knowledge of its officers and agents is where the latter are engaged in committing an independent fraudulent act upon their own account and the facts to be imputed relate to such fraudulent act. Fraud of officers or agents of a corporation practiced against the corporation, although of course known to them, is not imputable to the corporation where the corporation has not accepted the benefit or otherwise ratified the fraud."

Where the agent acts criminally, the inference is much stronger.

Even where the agent is the sole representative for his principal, the principal is not bound by the fraudulent or criminal acts of the agent, which he cannot be presumed to disclose to the principal, since such disclosure would be contrary to the agent's unlawful purpose. *Anderson* v. *General American Life Insurance Co.*, 141 F. (2d) 898, 907-909 (C. C. A. 6).

E. *The Indictment Charged No Offense against the Corporation.*

Section 302 of the Emergency Price Control Act, as amended, 50 U. S. C., War, Appendix, Section 942 (b), defines "price":

> "The term 'price' means a consideration demanded or received in connection with the sale of a commodity."

The indictment does not charge that the corporation demanded any sums whatever, nor does it charge that the illegal sums were actually received by the corporation. Each count in the indictment alleges that the illegal excesses were:

> ". . . paid to Robert Gould and Dowling Bros. Distilling Company by means of payment to Robert Gould."

Further, the indictment charges that Robert Gould:

> ". . . was then and there a principal stockholder and director of said Dowling Bros. Distilling Company."

The indictment thus rests its charges solely on the inference that, by virtue of his position as a stockholder and director, he represented the corporation. Such a charge does not allege sufficient agency or authority to impute to the corporation the acts of Gould, within the meaning of the Emergency Price Control Act.

The view universally taken as to the authority of a single stockholder or director to represent the corporation is well stated in 13 American Jurisprudence, "Corporations," Section 416:

> "Generally speaking, the stockholders have not power aside from that which is delegated to them as agents to represent the corporation or act for it in relation to its ordinary business. Authority to represent the corporation will not be implied merely by reason of the fact that the stockholder in question owns a large majority of the stock and has thereby power to select and control the board of directors."

and in 13 American Jurisprudence, "Corporations," Section 948:

> ". . . a single director of a corporation as such has no power to act in a representative capacity for the corporation; nor has he general authority to make contracts for the corporation, and there is no presumption that a contract purporting to be made by him was authorized by the corporation, even though he owns a majority of the corporate stock."

The presumption which underlay the charges against the corporation in the indictment being invalid, the indictment

was fatally defective so far as Dowling Bros. Distilling Company was concerned.

F. *The Trial Court's Instruction to the Jury with Reference to the Liability of the Corporation Was Erroneous.*

The court in effect instructed the jury that merely because Robert Gould was a stockholder and director of the corporation at the time he engaged in the illegal transactions charged, his acts would be imputed to the corporation. The court made no effort to inform the jury as to the circumstances under which a corporation might not be liable for the fraudulent or criminal act of its representative (R. 910-916, 921-922). Counsel for petitioner objected to the charge, and saved an exception (R. 917).

Thus, the clear import of the charge was to the effect that, since Robert Gould was a principal stockholder and a director of the corporation, the Dowling Bros. Distilling Company was, by virtue of that fact, liable for his acts.

In view of the considerations previously set forth, it is submitted that the trial court's charge to the jury erroneously damnified the corporation. See *Paschen* v. *United States,* 70 F. (2d) 491, 503 (C. C. A. 7); *Nobile* v. *United States,* 284 Fed. 253, 255 (C. C. A. 3); *United States* v. *Food and Grocery Bureau,* 43 Fed. Supp. 966 (S. D., Cal.).

III. The Admission of Testimony Relating to Extraneous Offenses for Which Defendants Had Never Been Conviced or Indicted Constitutes Reversible Error.

Three witnesses, Lee Friedman, Michael Friedman and William R. Gustin, were allowed to testify in rebuttal over the objection of defense counsel (R. 867-889, 892-894, 894-896). They testified with respect to alleged black market transactions not charged in the indictment and for which neither of petitioners had ever been convicted or indicted.

Since *Boyd* v. *United States,* 142 U. S. 450, it has been

unchallengeably established that the introduction of extrinsic testimony relating to specific instances of misconduct on the part of the defendant, when such offenses have not been charged in the indictment, is reversible error. 3 Wigmore on Evidence, §§ 979, 987. *United States* v. *Novick*, 124 F. (2d) 107, 109 (C. C. A. 2), cert. den., 62 Sup. Ct. 795; *Little* v. *United States*, 93 F. (2d) 401 (C. C. A. 8), cert. den., 58 Sup. Ct. 643; *Niederluecke* v. *United States*, 21 F. (2d) 511 (C. C. A. 8); *Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8); *Verro* v. *United States*, 95 F. (2d) 504 (C. C. A. 3); *Weil* v. *United States*, 2 F. (2d) 145 (C. C. A. 5); *Gideon* v. *United States*, 52 F. (2d) 427 (C. C. A. 8); *Sutherland* v. *United States*, 92 F. (2d) 305, 308 (C. C. A. 4); *Simpkins* v. *United States*, 78 F. (2d) 594, 597, 598 (C. C. A. 4); *Miller* v. *Oklahoma*, 149 Fed. 330 (C. C. A. 8).

Sometimes such extrinsic testimony may be admitted for the purpose of proving the defendant's motive, or of proving the existence of a continuing plan or scheme. Since no question of motive was involved in the instant case, and since the indictment charged only specific acts and did not charge a continuing plan or conspiracy, these exceptions are inapplicable. Indeed, their applicability was not asserted by the trial court or the Circuit Court of Appeals.

Rather the Circuit Court of Appeals affirmed the admission of this inadmissible testimony upon the mistaken assumption, stated in the court's opinion (R. 947) that Gould, the defendant, had testified on cross-examination that he never at any time sold whiskey at unlawful prices. Hence, the Circuit Court of Appeals concluded that the testimony in question was admissible on rebuttal to impeach the credibility of Gould's statement.

This assumption on the part of the Circuit Court of Appeals is clearly erroneous, being based on a view of the record originally accepted but later retracted by the trial court (R. 884).

On direct examination, Gould, referring to a list of Dowling Bros. Distilling Company's customers for the year 1943, testified that he had never sold whiskey to any of them at prices over the ceiling (R. 571). Similarly, Gould further testified that he had never sold any whiskey to Josselson at over-ceiling prices (R. 685).

As a result of this testimony, Gould was subjected, on cross-examination, to extended questioning with respect to sales made to the two Friedmans and to Gustin, none of whom were customers of Dowling Bros. during the year 1943 (R. 824-825).

Subsequently, the two Friedmans and Gustin were placed on the stand and their testimony was admitted by the trial court to impeach the credibility of Gould (R. 872-884). However, the trial court examined the record and specifically repudiated the previous erroneous assumption that Gould had testified flatly that he had never sold any whiskey at unlawful prices (R. 884).

Despite this action on the part of the trial court, the Court of Appeals affirmed the admission of the challenged testimony upon the very assumption which the trial court had retracted. Thus, if the admission of this testimony is to be upheld, it must be upon some ground other than that urged by the Court of Appeals.

However, even if Gould had testified on cross-examination in the manner in which the Court of Appeals incorrectly assumed he did testify, the evidence of the two Friedmans and Gustin would be inadmissible and its admission would still constitute reversible error. It is well settled that, though the defendant may be cross-examined regarding specific instances of misconduct extraneous to the offenses charged in the indictment, the prosecution is bound by his answers and may not introduce extrinsic evidence to rebut the testimony thus elicited. As Professor Wigmore states in Volume 3, Section 981 of his treatise on Evidence, page 548:

> ". . . The opponent cannot proceed to prove the alleged fact by extrinsic testimony and that, if he chooses to ask for testimony on this point from the witness himself, he must accept the chances of the jury believing a negative answer."

Under these circumstances, despite anything that the defendant may state on cross-examination, the admission of extrinsic testimony to contradict him is reversible error. *United States* v. *Novick*, 124 F. (2d) 107 (C. C. A. 2); *Little* v. *United States*, 93 F. (2d) 401 (C. C. A. 8).

Likewise, the trial court's basis for admitting the testimony was equally erroneous, since the admission of extrinsic evidence of specific offenses for the purpose of impeaching the reputation and character of the defendant constitutes reversible error. See *Eley* v. *United States*, 117 F. (2d) 526, 528 (C. C. A. 6); *United States* v. *Sager*, 49 F. (2d) 725 (C. C. A. 2); *Smith* v. *United States*, 10 F. (2d) 787 (C. C. A. 9); cases cited in footnote 1 to Section 987 of Wigmore on Evidence.[4]

Therefore, the admission of this testimony cannot be defended either on the theory espoused by the trial court or upon the erroneous assumptions of fact repudiated by the trial court and accepted by the Circuit Court of Appeals. The decision of the court below, therefore, is in conflict with the *Boyd* case and constitutes the affirmance of a radical departure from the accepted and usual course of judicial proceedings.

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[4] The cases cited by the Circuit Court of Appeals in support of its conclusion do not relate to the point in question here. All except one involved either evidence of prior convictions, or evidence elicited directly on cross-examination of the defendant himself. None deal with extrinsic testimony adduced to impeach the character of the defendant except *United States* v. *Rubenstein*, 151 F. (2d) 915 (C. C. A. 2). In that case, over the vigorous dissent of Judge Frank, the conviction was affirmed; however, the testimony in question was introduced for the purpose of proving defendant's fraudulent motive—a matter not here in issue. Furthermore, the Draconian views of the Circuit Court of Appeals for the Second Circuit with respect to matters of criminal procedure, are not unchallenged.

CONCLUSION

It is therefore urged that the petition for writ of certiorari should be granted.

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